

1 registered in his name since July 1994. (Ex. 11 at 386). DFS
2 offered and sold FCC license investments and services until
3 approximately April 1995, when defendants began using Bell's name
4 to do business. See note 5, supra. DFS has also failed to
5 comply with the California Telephonic Sellers Act. (Ex. 11 at
6 278). Defendant Berman is also a Bell salesperson, and has made
7 numerous misrepresentations to consumers and undercover
8 investigators. See page 23-24, supra.

10 III. STATEMENT OF FACTS

11 A. The Paging Industry

12 Paging businesses sell services that enable their customers
13 to communicate with each other and members of the public through
14 various radio frequencies. Paging carriers provide their
15 customers small battery-operated devices known as pagers that
16 receive messages transmitted by radio signals over a specific
17 geographic service area. (Ex. 15 at 593). Parties seeking to
18 provide such telecommunications services must first apply to the
19 FCC --- which regulates the use of radio frequencies throughout
20 the United States --- for permission to transmit radio signals.
21 This permission takes the form of a *license* for transmission
22 along a specific radio frequency for a period of years. (Ex. 15
23 at 593; Ex. 18 at 615).

24 Several different types of frequencies are licensed for the
25 provision of paging services. The FCC has specifically assigned
26 several frequencies in the 929 megahertz ("MHz"), 931 MHz, and
27 454 MHz range for the provision of paging services. (Ex. 15 at
28 594, 602; Ex. 18 at 615). Paging carriers predominantly use

1 these frequencies to provide paging services to the general
2 public. (Ex. 15 at 593-94).

3 Licenses issued by the FCC grant the licensee either
4 "shared" or "exclusive" use of a paging frequency for a specific
5 service area. (Ex. 15 at 593-94; Ex. 18 at 615). Some 929 MHz
6 frequencies are issued on a shared basis, which means that a
7 virtually unlimited number of individuals or companies may
8 acquire the right to use the same portion of the radio spectrum
9 within a defined service area. (Ex. 15 at 594; Ex. 18 at 615).
10 The remaining paging frequencies are issued on an "exclusive"
11 basis, which means that the licensee has the sole authority to
12 use its portion of a frequency in a given market. (Ex. 15 at 594;
13 Ex. 18 at 615). To obtain a license, an applicant must submit a
14 simple FCC Form 600 along with a nominal filing fee to cover
15 processing costs at the FCC.⁷ (Ex. 15 at 594; Ex. 18 at 615).
16 Form 600 requires the longitude and latitude of the tower sites
17 from which the applicant intends to transmit radio signals. In
18 most instances, the applicant need not conduct or include
19 engineering studies, site analyses, environmental impact studies,
20 and terrain studies in order to complete a paging license
21 application. (Ex. 15 at 594; Ex. 18 at 615).

22 A licensee must begin providing paging service to the public
23 within one year of being awarded a license, or the FCC will
24 revoke the license. 47 C.F.R. §§90.167, 22.511; (see also Ex. 18
25 at 617). The FCC expressly prohibits individuals and entities
26

27 ⁷ The FCC application fee a paging license is \$45 for a 929
28 MHz shared frequency and \$265 for a 931 MHz or a 454 exclusive
MHz frequency. (Ex. 18 at 615).

1 from obtaining, or even attempting to obtain, licenses for the
2 purpose of speculation or profitable resale. 47 C.F.R.
3 §§90.153(d), 22.137(d), 22.139; (see also Ex. 18 at 617). A
4 licensee is required to use the license only for the purpose of
5 providing telecommunication services.

7 **B. Defendants' Marketing Practices**

8 Defendants telemarket application preparation services for
9 paging licenses in the 929 shared, and 931 and 454 MHz exclusive,
10 frequency bandwidths. (E.g., Ex. 1 at 1; Ex. 3 at 27; Ex. 14 at
11 519). Defendants typically "cold call" consumers, and represent
12 that they will prepare and submit applications for valuable
13 paging licenses to the FCC for fees averaging from \$1,580 to
14 \$2,900 per license. (Ex. 3 at 27; Ex. 4 at 30; Ex. 6 at 104; Ex.
15 8 at 157; Ex. 12 at 393; Ex. 1 at 1). If a consumer shows
16 interest during Bell's initial sales pitch, the company sends the
17 consumer written promotional materials, often by Federal Express.
18 (Ex. 4 at 30; Ex. 5 at 64; Ex. 6 at 104; Ex. 9 at 175; Ex. 11 at
19

20
21 ⁸ Defendants have also sold investments in partnerships to
22 develop Specialized Mobile Radio ("SMR") systems, which also
23 require licenses issued by the FCC. (Ex. 18 at 618). One of
24 defendants' customers believed she was investing in a partnership
25 to acquire paging licenses, but actually appears to have invested
26 in something called the "Golden Denver 220 MHZ [SMR]
27 Partnership." (Ex. 8 at 158-89; Ex. 13 at 461). Defendants'
28 promotional materials also reference an Orlando, Florida
partnership. (Ex. 14 at 519). The sale of these partnership
interests appears to be a minor part of defendants' business.
Defendants sent the above-mentioned consumer a letter stating
that she was one of only six members of the Denver partnership.
(Ex. 8 at 173). A Bell telemarketer also told an undercover
Commission investigator that Bell stopped applying for SMR
licenses after the FCC froze the SMR licensing process. (Ex. 11
at 354-55).

1 277; Ex. 12 at 388-89; Ex. 14 at 477). Bell telemarketers
2 persistently follow up with additional phone calls, often urging
3 consumers to apply for several licenses. (Ex. 3 at 29; Ex. 4 at
4 30; Ex. 5 at 64; Ex. 3 at 158).

5 Bell telemarketers create a sense of urgency in their sales
6 pitches, telling consumers that they will no longer be able to
7 obtain licenses through Bell in a few days. (Ex. 11 at 367; Ex.
8 12 at 394; Ex. 5 at 64). Bell has continued to solicit other
9 consumers and undercover investigators well after the purported
10 "cut off" dates, however. (Ex. 3 at 27; Ex. 5 at 64; Ex. 6 at
11 107). Salespeople assure consumers that Bell will use its
12 expertise to apply for licenses for valuable markets (Ex. 4 at
13 30; Ex. 11 at 346; Ex. 12 at 399), and promise to assist
14 consumers with marketing the licenses they obtain free of charge.
15 (Ex. 2 at 26; Ex. 14 at 517). Bell encourages consumers who
16 decide to invest in licenses to send the requisite application
17 fees by bank wire (Ex. 2 at 11; Ex. 10 at 247). Bell then
18 applies to the FCC for paging licenses on the consumer's behalf.
19 (Ex. 6 at 105).

20 Consumers typically hear little from Bell after sending in
21 their money, except when Bell telemarketers "reload" them, or try
22 to get them to invest in more licenses through the company. (Ex.
23 1 at 2; Ex. 6 at 107; Ex. 8 at 159). When consumers contact Bell
24 to check on the status of their license applications, they have a
25 difficult time reaching their sales representatives, or they are
26 told to be patient and not worry. (Ex. 1 at 2; Ex. 2 at 7-8; Ex.
27 4 at 31; Ex. 6 at 106). A Bell representative even told one
28 consumer who complained to the Better Business Bureau ("BBB")

1 about Bell's unresponsiveness that the company would refuse to
2 help him obtain his licenses unless he signed a letter to the BBB
3 stating he was satisfied with Bell's services. (Ex. 6 at 106-
4 07).

5 Only one of the consumers who have executed declarations for
6 the Commission has actually received any licenses. (Ex. 1 at 3;
7 Ex. 4 at 31; Ex. 6 at 108; Ex. 7 at 156; Ex. 8 at 159-60).⁹ This
8 consumer has not received **any** offers to buy or lease his licenses
9 -- indeed, he states that paging carrier representatives
10 "practically laughed" at him when he tried to sell his licenses.
11 (Ex. 2 at 8). This consumer will lose his licenses -- and his
12 entire investment -- unless he begins to provide paging services
13 by February 1996. (Ex. 2 at 8).

14 15 **C. How Defendants Defraud The Public**

16 In their telemarketing sales pitches and in their written
17 promotional materials, defendants blatantly misrepresent the
18 nature and profit potential of the paging license investments
19 they promote, as charged in paragraphs fifteen to eighteen of the
20 Commission's complaint, and as set forth below.

21 22 1. Defendants Misrepresent That Their Customers Are Likely 23 To Earn Substantial Income Or Profit By Leasing Or 24 Selling Licenses Obtained Through Defendants' Application Services

25 Defendants claim that large paging companies will clamor to
26

27 ⁹ A Bell telemarketer told one Bell consumer that the Bell
28 "Confirmation Certificates" she received were equivalent to
actual FCC licenses -- another falsity. (Ex. 8 at 159-60).

1 lease or buy paging licenses from defendants' customers. Bell
2 telemarketers state that consumers will earn from \$300 to \$20,000
3 a month by leasing their licenses to existing paging companies.
4 (Ex. 11 at 331 [\$300 a month]; Ex. 7 at 155-56 [\$1500 a month];
5 Ex. 5 at 63 [\$3000 a month]; Ex. 8 at 157 [\$4000 a month]; Ex. 2
6 at 5 [\$10,000 to \$20,000 a month]). They also tell consumers
7 they will be able to sell their licenses to paging carriers for
8 \$10,000 to as much as \$60,000 each. (Ex. 2 at 28 [\$10,000 to
9 \$12,000]; Ex. 10 at 219 [\$15,000 to \$20,000]; Ex. 1 at 1
10 [\$20,000]; Ex. 2 at 5 [\$20,000 to \$60,000]).

11 In taped sales pitches, Bell salespeople, including
12 defendant Berman, projected that license investments would triple
13 within eight months to a year (Ex. 10 at 219); or realize a two-
14 or a three-to-one return. (Ex. 9 at 174; Ex. 11 at 331; Ex. 12 at
15 400). Bell's written promotional materials feature a chart
16 captioned "Potential Revenue \$.50 Per Pager/Month," which shows
17 "Annual Revenue" ranging from \$8000 to nearly \$12,000. (Ex. 2 at
18 1; Ex. 4 at 61; Ex. 5 at 73). Consumers are told that they can
19 expect profits within 6 to 24 months of receiving a license.
20 (Ex. 4 at 31; Ex. 10 at 219; Ex. 12 at 401).

21 These claims are false: consumers, rather than reaping
22 handsome profits, are unlikely to see any income or profit from
23 their investments. First, paging carriers do not "lease"
24 licenses for unconstructed, inoperational paging systems --
25 according to the Commission's expert, such a practice is foreign
26 to the paging industry. (Ex. 15 at 596). Indeed, four of the
27 largest U.S. paging companies have provided sworn declarations
28 stating that they have **never** leased unconstructed paging

1 licenses, and have no plans to do so in the future. (Ex. 16 at
2 610-11; Ex. 17 at 613; Ex. 19 at 630; Ex. 20 at 632-33).

3 The licenses defendants promote also have virtually no
4 resale value. The Commission's expert and paging carriers state
5 that carriers virtually never buy paging licenses from other
6 licensees, unless they are associated with up-and-running
7 systems. (Ex. 15 at 596; Ex. 17 at 612; Ex. 19 at 630; Ex. 20 at
8 632-33). Rather, paging carriers that need to expand their
9 services geographically do so by applying for additional FCC
10 licenses themselves, acquiring *developed* communications systems,
11 entering into service arrangements with other established paging
12 carriers, or upgrading their own technology. (Ex. 15 at 596; Ex.
13 20 at 633).

14 Paging carriers particularly have no reason to buy "shared"
15 licenses from Bell's customers, as they have stated in sworn
16 declarations. (Ex. 16 at 610; Ex. 17 at 612; Ex. 19 at 630; Ex.
17 20 at 632-33). Since there are an *unlimited* number of shared
18 paging frequencies for any given market, paging carriers can
19 obtain all of the shared spectrum they need from the FCC
20 directly, and for minimal cost -- indeed, for much less than Bell
21 charges its customers (Ex. 15 at 596-97; Ex. 18 at 616). A
22 representative of one paging carrier thus tells consumers who try
23 to sell shared paging licenses that their licenses are
24 "worthless." (Ex. 17 at 612; see also Ex. 16 at 610). As noted
25 above, one defrauded consumer stated that paging company
26 representatives "practically laughed" at him when he tried to
27 sell the shared licenses he obtained through Bell. (Ex. 2 at 7).
28 Defendant Berman himself even described shared licenses as

1 "worthless" while promoting exclusive paging licenses in one
2 taped sales pitch -- even though he pitched shared licenses as
3 "very attractive license[s] in the industry" in another taped
4 sales call. (Compare Ex. 11 at 330, with Ex. 14 at 584).

5 Similarly, paging businesses and the Commission's paging
6 expert agree that "exclusive" paging licenses alone, without
7 corresponding paging systems, almost always have minimal, if any,
8 resale value. (Ex. 15 at 597; Ex. 17 at 612; Ex. 19 at 630; Ex.
9 20 at 633). The only exclusive licenses with any potential
10 investment value are licenses for large metropolitan areas,
11 according to paging expert Elliott Hamilton. (Ex. 15 at 597).
12 Paging carriers confirm that they might be interested in
13 acquiring exclusive licenses for large metropolitan areas only.
14 (Ex. 17 at 612-613).

15 Yet the FCC had received all possible applications for
16 exclusive paging licenses for the nation's mid-sized and large
17 markets by late 1994. (Ex. 18 at 618). The FCC is unlikely to
18 grant applications filed after 1994 for these areas. (Ex. 18 at
19 618). Thus, if defendants have pitched consumers on license
20 application services for such a "top market" license, the
21 consumer will not receive a license at all.¹⁰ Some of
22 defendants' customers may receive exclusive licenses for smaller
23 markets -- but there is nothing to prevent paging companies from
24 applying to the FCC for licenses in those markets themselves.
25 (Ex. 15 at 594; Ex. 18 at 617). And, as discussed, paging
26

27 ¹⁰ Indeed, many consumers have not received the exclusive
28 licenses they were promised, see p. 10, supra, and will likely
have nothing to resell or lease.

1 companies have declared that they are unlikely to have any
2 interest in acquiring such licenses from other licensees. (Ex.
3 17 at 613; Ex. 19 at 640; Ex. 20 at 633). The end result is that
4 the licenses defendants' customers receive -- if they receive
5 anything -- are highly unlikely to have any investment value.

6
7 2. Defendants Misrepresent That Their Customers Will
8 Derive Income Or Profit From Licenses Obtained Through
9 Defendants' Application Services Without Constructing A
10 Paging System Themselves

11 Paging licenses, as mere authorizations to provide paging
12 services to the public, produce no revenue on their own. The
13 services that paging carriers provide to their customers generate
14 profits --- and such services require the construction of
15 expensive paging systems.

16 Defendants, however, tell consumers that they need not
17 concern themselves with constructing such systems because paging
18 companies will construct or finance the construction as part of
19 their leasing or purchasing arrangements. (Ex. 1 at 1-2; Ex. 5
20 at 64; Ex. 6 at 105; Ex. 7 at 156). One telemarketer claimed
21 that the license defendants promote are:

22 in such high demand that once you get the license, then
23 these other companies, they will basically take an
24 assignment of the license from you. They'll built it
25 out and put it into operation and that's how you make
26 money. . . . because Page Net and these big
27 companies will put it in operation and then they pay
28

1 you like a royalty. (Ex. 11 at 358-59).¹¹

2 In one taped sales call, defendant Berman stressed that an
3 investment in paging licenses through Bell was "passive":

4 Ms. Stoller: "Am I going to be running a business?"

5 Mr. Berman: "No, Ma'am. It's passive. It would be
6 managed by one of the other companies."

7 Ms. Stoller: "Well, how much would that cost me?"

8 Mr. Berman: "Nothing."

9 (Ex. 14 at 502; see also, Ex. 14 at 501, 576, and 583).

10 Unfortunately for the victims of defendants' scheme,
11 however, paging carriers do not build or finance paging systems
12 of other licensees, as they have stated in sworn declarations.
13 (Ex. 15 at 596; Ex. 16 at 610-11; Ex. 17 at 613; Ex. 19 at 630).
14 In fact, the passive sale or lease deals defendants pledge to
15 arrange for consumers are in all likelihood illegal, and would
16 expose to consumers to adverse FCC action, including license
17 revocation. FCC rules *prohibit* individuals from obtaining or
18 attempting to obtain paging licenses for profitable speculation
19 instead of providing paging services to the public. 47 C.F.R.
20 §§90.153(d), 22.137(d), 22.139. (See also Ex. 18 at 618). In
21 other words, the FCC prohibits "trafficking" in paging licenses,
22 and requires licensees to build and operate paging systems
23 themselves within one year of receiving their license. Id.
24 Failure to do so results in automatic revocation of the license.

25 ¹¹ The claim about PageNet, a major paging carrier, is an
26 outright lie: PageNet's legal counsel has stated in a sworn
27 declaration that she does not recall PageNet ever purchasing or
28 leasing an unconstructed shared or exclusive paging license of
 the type promoted by defendants that was not part of an
 acquisition of an existing paging system. (Ex. 20 at 632-33).

1 §§47 C.F.R. 90.167, 22.511. (See also Ex. 18 at 618). The FCC
2 also may prohibit the licensee from assigning or transferring his
3 or her license if it was obtained for speculative purposes. 47
4 C.F.R. 90.153(d); 22.137(d); 22.139. (See also Ex. 18 at 618).

5 Since consumers will be unable to lease or sell their
6 licenses, they must construct a costly paging system for each
7 license they hold to derive any income. (Ex. 15 at 595).
8 Initial equipment costs for a start up paging system are \$100,000
9 according to the Commission's expert, and annual operating costs
10 would easily exceed another \$100,000 for the first several years
11 -- leaving negative cash flows for many years. (Ex. 15 at 595).
12 None of the consumers providing declarations in this case have
13 stated that they ever had any intent of providing paging service
14 to the public themselves, much less had any plan to spend
15 substantial additional sums just to keep their initial
16 "investment" alive. (E.g., Ex. 1 at 2; Ex. 4 at 30-31; Ex. 6 at
17 105; Ex. 8 at 157). Rather than an excellent passive investment,
18 defendants have sold consumers a host of expensive burdens for
19 which they did not bargain.

20
21 3. Defendants Misrepresent That No Entity Or Individual
22 May Obtain Multiple Paging Licenses Directly From The
23 FCC For Use In A Given Geographic Area

24 Crucial to defendants' scheme is the false representation
25 that established paging companies are prohibited by law from
26 acquiring more than one paging license in any given geographic
27 area. Defendants claim paging operators therefore must buy or
28 lease licenses from other licensees, since they cannot obtain any

1 more themselves. (Ex. 1 at 1; Ex. 5 at 63; Ex. 7 at 155; Ex. 9
2 at 175; Ex. 10 at 222; Ex. 11 at 281; Ex. 12 at 397).

3 In fact, there is no such restriction on the number of
4 licenses a paging business may obtain, according to the FCC.
5 (Ex. 18 at 617). The Commission's expert and paging carrier
6 representatives confirm that paging operators can, and do, own
7 and operate more than one license per geographic area. (Ex. 15 at
8 594; Ex. 16 at 611; Ex. 17 at 613-14; Ex. 19 at 631; Ex. 20 at
9 633). In short, defendants' claim that such an "anti-monopoly"
10 restriction exists is a blatant fabrication designed to create a
11 false sense of demand for the licenses they promote.

12
13 4. Defendants Misrepresent That An Investment In
14 Defendants' License Application Services Is An
15 Excellent Investment That Is Likely to Generate
Substantial Profits

16 At the heart of defendants' scam is their claim that the
17 licenses they promote are excellent investments -- a government-
18 backed opportunity for small investors to reap handsome profits.
19 (E.g., Ex. 3 at 28 [paging companies would be "beating down my
20 door" for licenses]; Ex. 9 at 174 ["no safer opportunity with a
21 better rate of return"]; Ex. 10 at 214 ["safe as a savings
22 bond"]. Defendant Berman described such licenses as a "bonanza"
23 and a "giveaway." (Ex. 14 at 580). As one Bell salesperson
24 explained:

25 [W]e put you in a position to take advantage of and get
26 involved in the information superhighway. Okay. This
27 is a business opportunity that not just me or my
28 company, but almost all major financial publications

1 have repeatedly referred to as the best business
2 opportunity, period. . . . [L]et me tell you, I know of
3 no better, safer risk-reward business opportunity
4 available.

5 (Ex. 14 at 490-91). Defendants underscore their claims by
6 sending consumers copies of news articles about the information
7 superhighway and its successful entrepreneurs. (Ex. 2 at 18-25;
8 Ex. 4 at 49-55; Ex. 5 at 79-87; Ex. 6 at 117-123; Ex. 9 at 203-
9 213).

10 In fact, as shown above, the paging licenses defendants
11 promote are not excellent investments likely to generate
12 substantial profits for defendants' customers. Contrary to
13 defendants' false representations, paging carriers are unlikely
14 to lease or buy the licenses consumers pay defendants thousands
15 of dollars to obtain. Section III.C.1., supra. Therefore, to
16 realize any income from their investments, and comply with FCC
17 regulations, consumers will have to construct and operate paging
18 systems themselves. Section III.C.2, supra. As demonstrated,
19 the consumers defrauded by defendants are in no position to spend
20 hundreds of thousands of dollars ~~more~~ constructing and operating
21 a paging business -- only to lose money for the first several
22 years of operations. Even if consumers were to finance
23 construction of a paging system, they would face intense
24 competition from capital-rich and well established paging
25 carriers in virtually every major paging market in the country
26 (Ex. 15 at 598-600). The bottom line is that consumers are all
27 but certain to lose their licenses, and their entire investments.

1 IV. ARGUMENT

2 A. This Court Has Authority To Grant The Requested Relief

3 The Commission brings this action under the second proviso
4 of Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), which states
5 that "in proper cases the Commission may seek, and, after proper
6 proof, the court may issue, a permanent injunction."¹² The
7 Commission may seek a permanent injunction against violations of
8 "any provision of law enforced by the Federal Trade Commission."
9 15 U.S.C. § 53(b); see FTC v. Evans Products Co., 775 F.2d 1084,
10 1087 (9th Cir. 1985). A routine fraud case such as this one,
11 replete with misrepresentations of material facts in violation of
12 Section 5(a) of the FTC Act, qualifies as a "proper case" for
13 injunctive relief under Section 13(b). FTC v. H.N. Singer, Inc.,
14 668 F.2d 1107, 1111 (9th Cir. 1982).

15 In a Section 13(b) action, the Court may exercise the full
16 breadth of its equitable authority. As the Ninth Circuit in
17 Singer held:

18 Congress, when it gave the district court authority [in
19 Section 13(b)] to grant a permanent injunction against
20 violations of any provisions of law enforced by the
21 Commission, also gave the district court authority to

23 ¹² Because the Commission proceeds here under the second
24 proviso of Section 13(b) the conditions set forth in the first
25 proviso of Section 13(b) for the issuance of preliminary
26 injunctions in aid of administrative proceedings do not apply to
27 this case. FTC v. H.N. Singer, 668 F.2d at 1111 (routine fraud
28 cases may be brought under the second proviso, without being
conditioned on the first proviso's requirement that the
Commission institute an administrative proceeding); FTC v. U.S.
Oil & Gas Corp., 748 F.2d 1431, 1434 (11th Cir. 1984) ("Congress
did not limit the court's powers under the [second and] final
proviso of § 13(b)").

1 grant any ancillary relief necessary to accomplish
2 complete justice because it did not limit that
3 traditional equitable power explicitly or by necessary
4 and inescapable inference.

5 Singer at 1113. Thus under Section 13(b), the Court may order
6 remedies such as rescission of contracts and restitution, and
7 whatever additional temporary or preliminary relief is necessary
8 to preserve the possibility of final effective final relief. Id.
9 at 1112. This preliminary relief may include an order freezing
10 assets, an order permitting expedited discovery, and an order
11 appointing a receiver to ensure that assets are protected from
12 dissipation. See, e.g., Singer at 1113-1114; FTC v. U.S. Oil &
13 Gas Corp., 748 F.2d 1431, 1432 (11th Cir. 1984).¹³

14 **B. The Commission Has Made The Showing Required For**
15 **Issuance Of A Temporary Restraining Order And**
16 **Preliminary Injunction**

17 The Commission has made the showing required for issuance of
18 temporary and preliminary injunctive relief against defendants'
19 deceptive acts and practices. In order to obtain a preliminary

20
21 ¹³ In fact, in many previous routine Section 13(b) cases,
22 courts in this district have entered ex parte temporary
23 restraining orders granting the full panoply of relief requested
24 here. See, e.g., FTC v. American Fortune 900, Inc., Civ. No. 96-
25 305 RAP (RNBx) (C.D. Cal. Jan. 17, 1996); FTC v. Satellite
26 Broadcasting Corporation, SACV 95-336 LHM (EEx) (C.D. Cal. April
27 18, 1995); FTC v. Turcal, Inc., Civ. No. 94-1398 AWT (Jgx) (C.D.
28 Cal. Mar. 3, 1994); FTC v. Goddard Rarities, Inc., Civ. No. 93-
4602 JMI (C.D. Cal. Aug. 4, 1993); FTC v. World Wide Classics,
Inc., Civ. No. 92-3363 TJH (EEX) (C.D. Cal. June 4, 1992); FTC v.
Morgan Whitney Trading Group, Inc., Civ. No. 90-4887 RSWL (Sx)
(C.D. Cal. Sept. 12, 1990); FTC v. Newport Gems, Inc., Civ. No.
90-2001R (C.D. Cal. April 25, 1990); FTC v. Magui Publishers,
Inc., Civ. No. 89-3818 RSWL (GX) (C.D. Cal. June 26, 1989); FTC
v. Schoolhouse Coins, Inc., Civ. No. 87-05415 KN (TX) (C.D. Cal.
Aug. 7, 1987).

1 injunction, traditionally, the movant must show that: (1) it is
2 likely to succeed on the merits, (2) there is a possibility of
3 irreparable harm, (3) the balance of hardships weighs in its
4 favor, and (4) issuance of the requested relief will advance the
5 public interest. Miller v. California Medical Ctr. ("Miller"),
6 19 F.3d 449, 456 (9th Cir. 1994). Where the government moves for
7 injunctive relief in a statutory enforcement action, however, it
8 need now show irreparable injury if it shows a likelihood of
9 success on the merits. Miller, 19 F.3d at 459. Thus, where the
10 Commission moves for a preliminary injunction to stop violations
11 of the FTC Act, and shows a likelihood of success on the merits,
12 "[h]arm to the public interest is presumed." FTC v. World Wide
13 Factors, Ltd. ("World Wide Factors"), 882 F.2d 344, 346 (9th Cir.
14 1989).

15 When the Commission brings suit to enforce the FTC Act, it
16 is acting to prevent violations of federal law and, therefore,
17 proceeds "not as an ordinary litigant, but as a statutory
18 guardian charged with safeguarding the public interest in
19 enforcing the . . . laws." SEC v. Management Dynamics, Inc., 515
20 F.2d 801, 808 (2d Cir. 1975). Thus, in weighing the public and
21 private equities, the public interest should receive greater
22 weight. World Wide Factors, Ltd., 882 F.2d at 347 (citing FTC v.
23 Warner Communications, Inc., 742 F.2d 1156, 1165 (9th Cir.
24 1984)). This is particularly true where the evidence
25 demonstrates that a defendant's business is rooted in deception,
26 for a "court of equity is under no duty 'to protect illegitimate
27 profits or advance business which is conducted [illegally].'"
28 CFTC v. British American Commodity Options Corp., 560 F.2d 135,

1 143 (2d Cir. 1977), cert. denied, 438 U.S. 905 (1978) (quoting
2 FTC v. Thomsen-King & Co., 109 F.2d 516, 519 (7th Cir. 1940)).

3
4 1. The Commission Has Shown A Substantial Likelihood Of
5 Success On The Merits

6 a. Defendants' Misrepresentations Violate The FTC Act

7 Misrepresentations or omissions of material facts made to
8 induce the purchase of goods or services constitute deceptive
9 acts or practices that violate Section 5(a) of the FTC Act. FTC
10 v. World Travel Vacation Brokers, 861 F.2d 1020, 1029 (7th Cir.
11 1988); FTC v. Kitco of Nevada, Inc., ("Kitco"), 612 F. Supp.
12 1282, 1291 (D. Minn. 1985); see also Resort Car Rental System v.
13 FTC, 518 F.2d 962, 964 (9th Cir.), cert. denied, 423 U.S. 827
14 (1975). Thus, misrepresentations about the essential
15 characteristics or profit potential of investments violate
16 Section 5(a). See, e.g., Goodman v. FTC, 244 F.2d 584, 599 (9th
17 Cir. 1957); Kitco, 612 F. Supp. at 1292.

18 The Commission's extensive evidence in this case, outlined
19 in Sections III.C.1-4. above, shows that defendants' sales
20 pitches and written promotional materials are replete with
21 misrepresentations. As demonstrated, defendants' central
22 promotional claims: 1) that consumers are likely to earn
23 substantial profit by selling or leasing the paging licenses they
24 obtain through defendants' services to paging businesses, 2) that
25 consumers are likely to earn profit without developing paging
26 systems themselves, 3) that paging carriers are restricted from
27 obtaining more than one license per geographic area from the FCC,
28 and 4) that the licenses defendants promote are excellent

1 investments -- are all false.

2 The Commission's evidence thus demonstrates that defendants
3 have plainly and repeatedly misrepresented material facts in
4 violation of Section 5. The Commission has shown a strong
5 likelihood of success on the merits, and is therefore entitled to
6 the preliminary relief requested. World Wide Factors Ltd., 882
7 F.2d at 346.

8
9 b. Individual Defendants Justus And Berman Are Also Liable
10 Individual defendants Justus and Berman are key perpetrators
11 of this fraudulent scheme and are individually liable for the
12 violations of the FTC Act described above. To obtain an
13 injunction against an individual, the Commission must show that
14 the individual either participated in the unlawful acts of the
15 corporate defendant or that he or she played a role in directing,
16 controlling, or formulating the unlawful acts. FTC v. NCH, Inc.,
17 1995-2 Trade Cases (CCH) 71,114 at 75,351 (D. Nev. 1995); FTC v.
18 American Std. Credit Sys., Inc., 874 F. Supp. 1080, 1089 (C.D.
19 Cal. 1994). Similarly, an individual may be liable for monetary
20 redress under the FTC Act for corporate practices if the
21 Commission proves that the individual had actual or constructive
22 knowledge of the deception, and either participated in the
23 deceptive acts or had authority to control them. See, e.g., FTC
24 v. Amy Travel Serv., Inc., 875 F.2d 563, 573-75 (7th Cir.), cert.
25 denied, 493 U.S. 954 (1989) (citation omitted).¹⁴

26
27 ¹⁴ In the Ninth Circuit, the Commission may not even be
28 required to show knowledge or any kind of scienter to obtain
redress from an individual. See FTC v. Pantron I Corp., 33 F.3d

1 Defendant Justus is Bell's president, chief executive
2 officer, chief financial officer, and sole director. (Ex. 11 at
3 385). Justus also personally participates in Bell's deception by
4 soliciting consumers through written promotional letters and
5 telephone conversations. (Ex. 2 at 26; Ex. 6 at 153; Ex. 8 at
6 159). Defendant Berman is the owner of Discount Filing Services,
7 the outfit through which defendants operated their scam until
8 they began using defendant Bell's name to do business. (Ex. 11
9 at 386). Berman also acts as a Bell salesperson, and has himself
10 made numerous misrepresentations to undercover investigators in
11 taped sales pitches. (E.g., Ex. 11 at 281, 331; Ex. 12 at 397,
12 400; Ex. 14 at 502, 584). In short, both Justus and Berman
13 participate in the unlawful conduct outlined above, and as
14 managerial personnel, both are in a position to know about and
15 control the rampant fraud.

16
17 c. Fine Print Disclaimers Cannot Excuse Defendants'
18 Fraudulent Scheme

19 Defendants cannot excuse their fraud by inserting risk
20 disclosures among the many promotional materials they provide
21 consumers. (E.g., Ex. 5 at 100-03).¹⁵ It is settled law that

22
23 1088, 1103 (9th Cir. 1994).

24 ¹⁵ Bell telemarketers frequently dismiss the risk
25 disclosures during their sales pitches. (Ex. 1 at 2). One Bell
26 telemarketer told an undercover agent that she did not need to
27 read the disclosure before investing, adding "You just sign on
28 the bottom." (Ex. 10 at 259). According to the telemarketer,
"all [risk disclosures] say the same thing, and you have to stick
it in by law." (Ex. 10 at 257). Moreover, one 75 year old
consumer declarant did not even receive Bell's disclosures until
after she had invested. (Ex. 8 at 158, 167).

1 defendants cannot use such disclaimers to exonerate or legitimize
2 their fraudulent activity. See In re Rexplore, Inc. Securities
3 Litigation, 671 F. Supp. 679, 683-85 (N.D. Cal. 1987); CFTC v.
4 U.S. Metals Depository, 468 F. Supp. 1149, 1161 (S.D.N.Y. 1979).
5 See also Chrysler Corp. V. FTC, 561 F.2d 357, 363 (D.C. Cir.
6 1977); SEC v. Comcoa Ltd., 855 F. Supp. 1258, 1262 (S.D. Fla.
7 1994) ("when considering [defendant's] scheme in its entirety,
8 the Court gives little deference, if any, to these carefully
9 crafted 'exculpatory clauses' inserted in the agreements").

10 Rather, the Court must consider the net impression that
11 defendants' representations have had on consumers. See FTC v.
12 Atlantex Associates, 1987-2 Trade Cas. (CCH) 67,788 at 59,254
13 (S.D. Fla. 1987), aff'd, 872 F.2d 966 (11th Cir. 1989); see also
14 Southwest Sunsites, Inc., 106 F.T.C. 39 (1985), aff'd, 785 F.2d
15 1431 (9th Cir. 1986), cert. denied, 479 U.S. 828 (1986). When so
16 considered by this standard, defendants' efforts to "cover their
17 tracks" through such disclaimers are plainly ineffective.¹⁶

18
19 2. The Balance Of Public Equities Mandates Preliminary
20 Relief

21 The public equities in this case mandate the proposed
22 injunctive relief. The Commission has presented substantial
23 evidence showing that defendants are engaged in a widespread,
24 fraudulent scheme to sell applications for FCC licenses. The

25
26 ¹⁶ Neither can defendant Berman cure his fraud by stating
27 that paging license investments are "speculative," or mentioning
28 that there is "a potential for risk" during his sales pitches.
(Ex. 14 at 498; Ex. 12 at 393). These vague caveats in no way
excuse Berman's numerous and blatant misrepresentations. See p.
23-24, supra.

1 injury to consumers is large -- defendants have taken in more
2 than \$4.5 million dollars through their scheme, and, as explained
3 above, it is likely that consumers will lose all of their
4 investments as a result of defendants' deceit. The Court must
5 halt defendants' deception to prevent further injury to the
6 public.

7 The proposed temporary injunctive relief is narrowly drafted
8 to restrain defendants from further violations of Section 5 of
9 the FTC Act in the specific ways in which they have violated it.
10 The proposed relief would plainly serve the public interest by
11 stopping the deception perpetrated by defendants and preventing
12 further harm to consumers. See, e.g., National Society of
13 Professional Engineers v. United States, 435 U.S. 679, 697
14 (1978).

15
16 **C. An Asset Freeze, Temporary Receiver For Defendant Bell,**
17 **Immediate Access To Defendant Bell's Offices, And**
18 **Expedited Discovery Are Necessary To Prevent**
Dissipation Of Assets And To Preserve The Possibility
Of Effective Final Relief For Consumers

19 Defendants have illegally obtained millions of dollars
20 through their deceptive practices. Where, as here, defendants'
21 business operations are permeated by fraud, there is a strong
22 likelihood that they will attempt to dissipate or conceal their
23 assets during the pendency of the action. See, e.g., SEC v.
24 Manor Nursing Centers, Inc., 458 F.2d 1082, 1106 (2d Cir. 1972);
25 SEC v. R.J. Allen & Associates, Inc., 386 F. Supp. 866, 881 (S.D.
26 Fla. 1974). Mindful of this likelihood, courts in this district
27 have ordered the freezing of assets, appointment of receivers,
28 and other ancillary relief, including expedited discovery and

1 access to defendants' business premises, in circumstances similar
2 to those found here. See note 13, supra (citing numerous
3 instances where Courts in this District have granted such
4 relief).

5 As part of the final remedy in this case, the Commission
6 seeks monetary redress for the consumers defendants have
7 defrauded. Defendants' assets must therefore be frozen to
8 preserve the possibility of restitution to the victims of their
9 scheme. See Singer, 568 F.2d at 1113 (asset freeze appropriate
10 when Commission objective is "to obtain restitution of moneys
11 fraudulently obtained"). The Court may impose an asset freeze
12 when there is a mere possibility of asset dissipation. FSLIC v.
13 Sahni, 868 F.2d 1096, 1097 (9th Cir. 1989) (district court
14 holding that required a showing of "likelihood" of asset
15 dissipation placed an undue burden on the FSLIC). Without an
16 asset freeze, there is a substantial risk that what remains of
17 the proceeds of defendants' unlawful conduct will be dissipated
18 or concealed, causing irreparable injury to the Court's ability
19 to grant effective final relief to injured consumers.

20 The appointment of a temporary receiver is also necessary
21 to maintain the status quo and prevent the destruction of
22 documents and sequestration of assets during the pendency of this
23 proceeding. See, e.g., FTC v. U.S. Oil & Gas Corp., 748 F.2d
24 1431, 1432 (11th Cir. 1984) (appointment of receiver in §13(b)
25 action held proper when defendants were fraudulent
26 telemarketers); CFTC v. Co Petro Marketing Group, Inc., 680 F.2d
27 573, 582 n.16 (9th Cir. 1982) (appointment of receiver held
28 proper because the illegal conduct was carefully planned, tightly

1 controlled, and systematically carried out, thus creating a
2 reasonable likelihood of future violations).¹⁷

3 The individual perpetrators of this fraud cannot be trusted
4 to operate defendant Bell honestly. Only a receiver will be able
5 to marshal and safeguard corporate assets, determine the size and
6 extent of defendants' fraud, and identify consumers injured by
7 defendants' practices. The Commission recommends that the Court
8 appoint Frank Sweeney as the receiver for the corporate defendant
9 Bell. See Plaintiff's Memorandum Recommending Frank Sweeney as
10 Temporary Receiver.

11 The Commission also seeks leave of Court to expedite
12 discovery for the immediate purpose of locating defendants'
13 assets and records. Specifically, the Commission seeks
14 permission on 48 hours notice to conduct depositions and to
15 request production of documents for the limited purposes of
16 identifying and securing assets and business records. The
17 Commission also seeks an order granting its staff immediate
18 access to relevant documents at defendant Bell's offices. The
19 Court may grant such relief under its equitable authority to
20 order such ancillary relief as is needed to accomplish a just
21 result in this proceeding. Singer, 668 F.2d at 1133, and courts
22 in this district have granted such relief to the Commission in
23 several similar cases. See note 13, supra. Such immediate
24

25 ¹⁷ See also SEC v. Bowler, 427 F.2d 190, 197-98 (4th Cir.
26 1970) (a prima facie showing of fraud and mismanagement, absent
27 insolvency, is sufficient basis for appointment of receiver); SEC
28 v. Capitol Counselors, Inc., 332 F. Supp. 291, 304 (S.D.N.Y.
1971) (receiver appointed "to prevent diversion or waste of
assets to the detriment of those for whose benefit, in some
measure, this injunctive action is brought").

1 access is needed to protect evidence against destruction and to
2 determine (1) the full scope of defendants' wrongdoing, (2) the
3 identities of injured consumers, (3) the total amount of consumer
4 injury, (4) and the location of defendants' assets.

5 Any hardship the relief sought here imposes on defendants is
6 outweighed by the public equities. Although the requested relief
7 "may disrupt defendants' business activities, this court is under
8 no obligation to recognize this equity in the continued operation
9 of the business because the business is permeated with deception
10 designed to harm the public." FTC v. Silueta Distributors, Inc.,
11 1994 Dist. LEXIS 10095, *1 (N.D. Cal. 1994). The overriding
12 public interest is in preserving available assets for return to
13 defrauded consumers.

14
15 **D. The Temporary Restraining Order Should Be Issued Ex**
16 **Parte**

17 The substantial risk of immediate asset dissipation and
18 document destruction, coupled with defendants' ongoing illegal
19 conduct, establishes "immediate and irreparable injury, loss, or
20 damage" justifying ex parte relief pursuant to Rule 65(b) of the
21 Federal Rules of Civil Procedure.¹⁸ As demonstrated, defendants
22 are engaged in a patently fraudulent telemarketing scheme

23
24 ¹⁸ Congress has looked favorably on the availability of ex
25 parte relief under Section 13(b) of the FTC Act. In passing the
26 Federal Trade Commission Act Amendments of 1994, the Senate
27 observed: "Section 13 of the FTC Act authorizes the FTC to file
28 suit to enjoin any violation of the FTC [Act]. The FTC can go
into court ex parte to obtain an order freezing assets, and is
also able to obtain consumer redress." S. Rep. No. 130, 103rd
Cong., 2d Sess. 15-16, reprinted in 1994 U.S. Code Cong. & Admin.
News 1776, 1790-91.

1 exposing them to various civil and criminal sanctions, and thus
2 have every incentive to secrete recoverable assets and destroy
3 inculpatory documents if given notice of the Commission's action.
4 Defendants have also flouted the laws of the State of California
5 by failing to register as a telephonic seller and post a required
6 \$100,000 bond with the California Department of Justice, exposing
7 them to additional penalties. (Ex. 11 at 278)¹⁹ They simply
8 cannot be trusted to preserve the status quo absent ex parte
9 relief. The Commission's past experiences have shown that
10 defendants engaged in similar schemes will withdraw funds from
11 bank accounts and move or shred documents upon discovery of
12 impending action by the Commission. See Certificate of
13 Plaintiff's Counsel in Support of Ex Parte Application ¶7.
14 (citing numerous instances of such conduct).

15 Courts in this District have therefore repeatedly granted
16 the Commission ex parte relief in Section 13(b) cases similar to
17 the one described herein. See note 13, supra. "Boiler room"
18 fraud cases such as this one fit squarely into the narrow
19 category of situations where ex parte relief is appropriate:

20 The ex parte temporary restraining order is indispensable to
21 the commencement of an action when it is the sole method of
22 preserving a state of affairs in which the court can provide
23 final relief. Immediate action is vital when imminent
24

25 ¹⁹ Failure by a telephonic seller to file the required
26 registration may be punishable with a prison term of up to a year
27 and a fine of up to \$10,000. Cal. Bus. & Prof. Code § 17511.9.
28 Furthermore, the same penalties obtain for any person who
"directly or indirectly employs any device, scheme, or artifice
to deceive in connection with the offer or sale by any telephonic
seller." Id.